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In The

Supreme Court of the United States

HAROLD E. SHEPLEY, JR., RICHARD A. KIMMEL, GARY L. MILLER, ELMER C. BEEMAN, JR., MARK E. DeFLORI, DOROTHY B. MARKER and a class of all others similarly situated,

Petitioners,

v.

NEW COLEMAN HOLDINGS INC., formerly known as THE COLEMAN COMPANY, INC., GLEN P. DICKES, DONALD G. DRAPKIN, WILLIAM J. FOX, HOWARD GITTIS, RICHARD E. HALPERN, FREDERICK W. MCNABB, JR., RONALD O. PERELMAN, BRUCE SLOVIN, FRED L. TEPPERMAN, CARL T. TSANG, WARREN B. ARMSTRONG, KENNETH J. WAGNON, RICHARD D. SMITH, MacANDREWS ACQUISITION (KANSAS), INC., MacANDREWS & FORBES HOLDINGS, INC., JAY DAVIS, JEFFREY CURTIS and TIMOTHY P. COTTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent New Coleman Holdings Inc. is owned by Respondent MacAndrews & Forbes Holdings Inc., which in turn is owned by Mafco Holdings Inc. Respondent MacAndrews Acquisition (Kansas) Inc. has been merged into Respondent MacAndrews & Forbes Holdings Inc.

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INTRODUCTION

This case is wholly inappropriate for review on certiorari. Contrary to Petitioners' contentions, there is no conflict among the Circuits: the Courts of Appeals have had no difficulty articulating a standard for determining when reversion of excess funds in a terminated defined benefit plan is permitted under ERISA. The unanimous Second Circuit decision in this case is entirely consistent with that standard, and with this Court's recent opinion in *Hughes Aircraft Co.* v. *Jacobson*, 119 S. Ct. 755, 761-62 (1999), which reaffirmed that participants in a defined benefit plan have "no entitlement to share in a plan's surplus — even if it is partially attributable to the investment growth of their contributions." The Court of Appeals opinion breaks no new ground. It is a straightforward — and clearly correct — interpretation of the provisions of a particular pension plan, resting on the specific language of that agreement and the specific facts of this case.

Petitioners are just as wide of the mark in arguing that this case presents the issue of whether a reversion provision must be "clear and affirmative." Even if there were reason for this Court to endorse such a standard — and there is not — the plan at issue here would satisfy it. As the Court of Appeals found, the language of the plan is unambiguous and makes sense only if reversion *is* permitted. Petitioners received every penny of the benefits they were promised under the plan — indeed, after termination, Respondents even instituted a replacement plan to provide uninterrupted coverage. The Court of Appeals properly determined that Petitioners sought an undeserved windfall not authorized under ERISA, and we submit that there is no good reason for this Court to disturb that result.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, are former employees of The Coleman Company ("Coleman" or the "Company") and former participants in The Coleman Company, Inc. Pension Plan for Weekly Salaried and Hourly Paid Employees (A66-67) (the

"Plan").[1/] Petitioners purport to represent an alleged class of 4,900 participants or beneficiaries of the Plan as of June 30, 1989 (A38-39, A68).

Respondents, defendants below, are Coleman; MacAndrews & Forbes Holdings Inc. ("MacAndrews"), which acquired Coleman; MacAndrews Acquisition (Kansas), Inc., a MacAndrews subsidiary formed for purposes of the acquisition; and sixteen individuals who were directors of Coleman and/or members of Coleman's Retirement and Benefits Committee.

The Plan and Trust Agreement

Under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), there are two broad types of single employer pension plans — defined contribution plans and defined benefit plans. *See* 29 U.S.C. § 1002(34) and (35). In a defined contribution plan, contributions are made to individual accounts for each participant, and benefits are based upon those contributions and any gains and losses attributable to each account. Participants' benefits from such a plan, therefore, include investment earnings attributable to that person's individual account. *See* 29 U.S.C. § 1002(34). A defined benefit plan, in contrast, specifies the pension benefits that beneficiaries will receive, and employer contributions are based upon actuarial estimates of the amounts that will have to be invested to provide those benefits. Employees are entitled to the prescribed benefits regardless of the investment performance of the plan's assets. As this Court recently explained, in a defined benefit plan:

> plan members generally have a nonforfeitable right only to their "accrued benefit," so that a plan's actual investment experience does not affect their statutory entitlement. Since a decline in the value of a plan's assets does not alter accrued benefits, *members similarly*

[1/] "A__" refers to the Joint Appendix in the Court of Appeals.

> *have no entitlement to share in a plan's surplus — even if it is partially attributable to the investment growth of their contributions.*

Hughes Aircraft Co. v. *Jacobson*, 119 S. Ct. 755, 761-62 (1999) (emphasis added).

The Coleman Plan was a defined benefit plan, funded solely by employer contributions. No employee contributions were required or allowed (A120). From its inception, the Plan provided that, upon termination, surplus assets — those not necessary to pay benefits — would revert to Coleman. The initial version of the Plan and each amendment called for repayment to the Company of the surplus, referred to as "funds remaining in the Trust Fund as a result of overpayment." Thus, in the original 1955 Plan, Article VII, Section 3 stated:

> The Company shall have no right, title, or interest in the contributions made by it to the Trustee, and no part of the Trust Fund shall revert to the Company *except that after satisfaction of all liabilities of the Plan any funds remaining in the Trust Fund as a result of over-payments may revert to the Company.*

(A620) (emphasis added).

The 1984 version of the Plan, which was in effect until the Plan's termination in 1989, provided in Section 9.2(c):

> The Company and any Adopting Employer shall have no right, title, or interest in the contributions made by it to the Trustee or Trustees, and, except as permitted by Section 15.4, no part of the Trust Fund shall revert to the Company or any Adopting Employer, *except that after satisfaction of all liabilities of the Plan, any funds*

> *remaining in the Trust Fund as a result of overpayment may revert to the Company* or Adopting Employer.

(A120) (emphasis added).

In addition to this language, each successive version of the Plan explicitly provided that the "balance" of funds remaining after satisfaction of Plan liabilities would be disposed of on termination "as the Company may direct." Each of these versions contained the following language, which appeared in Section 11 of the 1984 Plan:

> If the Plan is being discontinued as to all employees [and there is any balance remaining after satisfaction of liabilities], *the Trustee shall dispose of such balance as the Company may direct*.

(A128, A626, A694) (emphasis added).

Contrary to what Petitioners assert (Pet. 3), the August 1, 1977 Trust Agreement is consistent with these reversion provisions, as the Second Circuit ruled (App. 8). Petitioners assert that Paragraph 15.2 of the Trust Agreement "provided for distribution of surplus assets to the employees," but they quote that provision only *in part*. They deliberately omit the final, dispositive sentence of the paragraph, which makes it clear that Plan participants would be entitled to the surplus *only if the Plan did not provide otherwise:*

> The Employer shall have no beneficial interest in the Trust Fund either during its continuance or upon termination of this Trust, *except as otherwise provided in the Plan*.

(A325) (emphasis added). Similarly, the Trust's "exclusive benefit" provision, Paragraph 14, also defers to the Plan, using the same words ("except as otherwise provided in the Plan") (A324).

The Change in Control Provisions

By the 1980's, the funds generated by Coleman's contributions to the Plan were substantially more than enough to pay the promised benefits. As the resulting surplus would be available to the Company upon termination of the Plan, Coleman added "Change in Control" provisions designed to deter any hostile outsider who might be motivated to take over the Company, terminate the Plan, and recover the surplus. Section 9.2(c) of the Plan — the very section containing the "overpayment" language — was amended to prohibit reversion to the Company in the event of a hostile acquisition, which the Plan referred to as a "Change in Control":

> In the event of a Change in Control, such reversion shall not take place and the provisions of Section 11 shall apply.

(A120). As the Court of Appeals noted, this provision would have been unnecessary if the Plan did not provide for reversion of surplus assets to the Company.

Section 11.6 of the 1984 version of the Plan provided a means of allocating any surplus among participants in the event of a Change in Control (A128-29). The Plan contained no provisions, however, for allocating the surplus among participants if a Change in Control did *not* occur, further evidencing that the drafters of the Plan understood that any such surplus would revert to the Company.

The Acquisition of Coleman

In early 1989, the incumbent management of Coleman, led by Sheldon Coleman, sought unsuccessfully to purchase the Company. A fundamental assumption of this management effort — an assumption openly announced to Coleman employees, and not questioned by them or anyone else — was that, as long as the takeover was friendly, the Plan surplus would be available to the

Company after the acquisition. On February 22, 1989, Sheldon Coleman wrote to his fellow Coleman employees:

> Financing this buyout is a huge task. Not only does it take nearly $100 million of Coleman Family investments and loans, but we need other funds as well.
>
> *One place we can get some of these funds is from our two U.S. Pension plans that are "overfunded".* This "overfunding" resulted from our past successful investment of the assets dedicated to support future benefit needs. *The "overfunding" is available to the company after all future pension benefits are assured* through annuity contracts for each individual current employee and retiree. This includes all active participating employees, regardless of their length of service.
>
> As part of the buyout proposal we are suggesting terminating the pension plans, treating all participating employees as though they were vested, buying annuities which secure the future payment of your earned pension benefit, and then *releasing the amount of the overfunding to reduce the debt burdens of the Company.*

(A628) (emphasis added).

In June 1989, after the management proposal faltered, MacAndrews acquired Coleman on a friendly basis, through a tender offer that Coleman's Board of Directors unanimously recommended to shareholders (A70-71, A332-60, A705).

The Termination and Reversion

After the MacAndrews acquisition, Coleman terminated the Plan and recovered the surplus. This was done openly, in a publicly disclosed transaction reviewed by two government agencies — the Pension Benefit Guaranty Corporation and the Internal Revenue

Service. Throughout this process, no one ever suggested that the Plan's provisions for a reversion to the Company were inapplicable.

Upon termination, Coleman satisfied all of the Plan's liabilities to all Plan participants by purchasing a guaranteed annuity from Aetna Life Insurance Company and by making various lump sum distributions (A73, A595-600). The remaining $13,895,380 surplus was paid to the Company (A73, A599). Coleman then started a replacement pension plan, so that continuing employees continued to earn pension credits for post-termination service. There was no loss in benefits, and pension coverage continued uninterrupted (A532-33; A539).

This Action and the Rulings Below

Not a word of protest to the reversion was heard until 1995, when Petitioners filed this action just as the statute of limitations was about to expire. Even then, Petitioners did not assert the "overpayment" theory upon which they now rely. Rather, Petitioners began this action under the misconception that Respondents had somehow inadvertently triggered the Change in Control provisions of the Plan — an issue not raised in the Petition. It was only during briefing on cross-motions for summary judgment in the District Court that Petitioners came up with the theory that the word "overpayment" should be interpreted to bar a reversion.

Both sides moved the District Court for summary judgment on the issue of liability. Without hearing argument, the District Court granted summary judgment for Petitioners. The District Court found that Section 9.2(c)'s provision for reversion of "funds remaining . . . as a result of overpayment" did not apply to the surplus funds at issue, because those funds resulted from higher than expected investment return, "not from excess money contributed to the fund" (App. 29). The District Court recognized that this interpretation created a conflict between Section 9.2(c) and Section 11.5(d)(2), which, without any limitation, directed the Trustee to dispose of surplus funds "as the Company may direct," but the court sought to resolve this conflict by re-interpreting

Section 11.5(d)(2) to mean that the Company "may direct the distribution of funds as long as it is done in compliance with the Plan" (App. 30).

At Respondents' request, the District Court certified its order for interlocutory review under 28 U.S.C. § 1292(b). The Second Circuit accepted the interlocutory appeal, reversed the District Court's ruling, and directed the lower court to enter summary judgment for Respondents. The Second Circuit found that Sections 11.5(d)(2) and 9.2(c) of the Plan expressly and *unambiguously* provide for reversion of the surplus funds at issue (App. 10). It ruled that the word "overpayment" in Section 9.2(c) meant "the overage of the Plan assets (those contributed by Coleman, and any corresponding investment returns) net of plan liabilities (including the funding of vested pension obligations) at the time the Plan is terminated," and thus included the surplus funds at issue (App. 10). The Court observed that the contrary view of Petitioners and the District Court — that "funds remaining . . . as a result of overpayment" refers only to contributions that are excessive at the time the contributions are made — "rests on a misunderstanding of the fundamental nature of defined benefit plans":

> Because employers rely upon multi-variable actuarial estimates in determining the amount to contribute to their plans . . . it is inevitable that their contributions (plus any investment returns) will ultimately prove to be either more or less than required. . . . But the fact of a surplus or deficit, and its amount, can only be determined by hindsight.

(App. 11-12).

The Second Circuit noted that its reading of "overpayment" not only clarified the supposed "ambiguity" the District Court had found in the Plan, but was also confirmed by other parts of the Plan, including the Change in Control provisions:

> If (as the district court and the participants believe) the provisions they cite direct the surplus to Plan participants and beneficiaries, it would be unnecessary to provide specially for the channeling of surplus to Plan participants and beneficiaries in the event of a "Change in Control." But that is exactly what the Plan does.

(App. 13-14).[2/]

REASONS FOR DENIAL OF THE WRIT

I. There is No Conflict Among the Circuits

Petitioners' argument that the Court of Appeals' ruling creates a conflict among the circuits (Pet. 6-12) is simply incorrect. The Second Circuit's ruling rests on a logical — and clearly correct — construction of the Plan. ERISA clearly states that employers may recapture surplus pension assets after all liabilities of a plan have been satisfied, if the plan provides for such a reversion. *See* 29 U.S.C. § 1344(d)(1). The Second Circuit did not adopt any novel interpretation of the statute. It simply ruled that this particular plan does provide for reversion.

Contrary to petitioners' claims, the circuit courts have consistently rejected the notion that ERISA mandates a presumption against reversion. Case after case has stressed the important policy reasons in favor of *permitting* reversions to employers and recognized that awarding surplus pension assets to employees would create a windfall. For example:

[2/] On May 6, 1999, ten days after the Second Circuit issued its mandate, Petitioners filed a "motion for clarification" of the court's ruling, asking the court to amend its ruling to apply only to the "overpayment" issue and not to Petitioners' alternative theory that reversion was barred because Respondents had inadvertently triggered the Change in Control provisions. Petitioners' motion, which Respondents opposed, is still pending in the Second Circuit.

- *Hawkeye Nat'l Life Ins. Co.* v. *AVIS Industrial Corp.*, 122 F.3d 490, 502 n.7 (8th Cir. 1997):

> Several courts have recognized that a per se rule awarding residual or surplus assets to plan participants and beneficiaries does not necessarily promote ERISA's goals. These courts have recognized that awarding residual assets to participants and beneficiaries may undermine the financial stability of pension plans by penalizing employers for overfunding plans and thereby providing an incentive for employers to underfund plans so as to avoid losing residual assets upon termination of the plan. In addition, these courts have recognized that a per se rule awarding residual assets to participants may provide participants with a benefit for which they have not bargained.

- *Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1987):

> A rule that read ERISA "exclusive benefit" language to prohibit a reversion to the employer might tempt employers to be overly cautious in funding their plans. An employer that knew that it was prohibited from recapturing the surplus might be tempted to underfund its plan — a result that would benefit no one.

- *Jamail, Inc.* v. *Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 304 (5th Cir. 1992):

> [I]f ERISA is going to achieve its objective, it should encourage employers to err toward overpayment rather than to slight the fund because of a fear that there can be no effective restitution. If employers perceive that no refunds are available, they are likely to delay payment to the fund until they can calculate accurately the precise amount they owe. This denies to the fund working capital which could be crucial to its survival. It is true that

ERISA is properly construed to benefit employees, but a fundamental fairness to employers is implicit in establishing such funds.

In these and other cases, the lower courts have consistently upheld reversions of surplus assets to employers where, as here, the applicable plan provided for such a reversion.[3/] This Court's recent observation in *Hughes Aircraft* that participants in a defined benefit plan ordinarily "have no entitlement to share in a plan's surplus — even if it is partially attributable to the investment growth of their contributions," 119 S. Ct. at 761-62, confirms that these cases were correctly decided.

The cases that Petitioners rely upon (Pet. 7-8) are consistent with these authorities and with the Second Circuit's ruling here. In *Albedyll* v. *Wisconsin Porcelain Co.*, 947 F.2d 246 (7th Cir. 1991), the court denied reversion because the plan specifically provided that surplus funds would be distributed to *participants* upon termination, and specifically set forth a formula for doing so. *Id.* at 249 n.1, 256. In addition, plan outlines distributed to employees said that the employer "can neither recover any of its contributions to the plan nor any of the principal nor income of the funds created by the plan," and that on termination "all money previously contributed by the Company and the employees remains in the pension fund and will eventually be distributed to participants in the plan." *Id.* at 249 n.2 & n.3. Similarly, in *Rinard* v. *Eastern Co.*, 978 F.2d 265 (6th Cir. 1992), the court disallowed reversion where an earlier plan had expressly allowed for reversion, but the applicable plan *omitted* the reversion provision. *Id.* at 267, 269. In neither case did the court rule that an express provision

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[3/] *See, e.g.*, *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1318-19 (5th Cir. 1994); *Outzen* v. *FDIC*, 948 F.2d 1184 (10th Cir. 1991); *Washington-Baltimore Newspaper Guild Local 35* v. *Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd mem.*, 729 F.2d 863 (D.C. Cir. 1984); *Lynch* v. *J.P. Stevens & Co.*, 758 F. Supp. 976 (D.N.J. 1991).

providing for reversion to the employer was insufficiently "clear" or "affirmative" to satisfy ERISA's requirements, or that such a provision would have to meet some heightened standard of clarity.[4/]

Remarkably, Petitioners also rely upon the *district court* opinion in *Int'l Union of Elec., Elec., Salaried, Mach. and Furniture Workers* v. *Murata Erie N. Am., Inc.*, 772 F. Supp. 870, 872 (W.D. Pa. 1991), which barred an amendment to a plan that added a reversion provision. The Third Circuit *reversed* that ruling and discussed the important policy reasons *favoring* reversions. The appeals court stated:

> Because of the strong policy concern that employers not be encouraged to underfund defined benefit plans, *see* [*Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1987)], the language purporting to prohibit amendment to plan documents to allow for reversion of excess funds in a defined benefits plan must be quite explicit.

Int'l Union of Elec., Elec., Salaried, Mach. and Furniture Workers v. *Murata Erie N. Am., Inc.*, 980 F.2d 889, 906 (3d Cir. 1992).[5/]

Moreover, even if there were a case that adopted Petitioner's proposed standard, the Second Circuit's ruling here is in accord

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[4/] The court in *Rinard* refers to "ERISA's clear presumption against reversion," 978 F.2d at 269, but is plainly referring merely to ERISA's requirement that residual assets may not revert to the employer unless the plan so provides. *Rinard* does not suggest that a court should press to find a construction that bars reversion.

[5/] Petitioners also suggest that Congress is hostile to reversions because it has imposed taxes on funds that employers recover through reversions (Pet. 14-15). More to the point is that, even after repeated judicial decisions favoring reversion, Congress has never acted to bar reversions and has left the standard under 29 U.S.C. § 1344(d)(1) unchanged.

with such a standard. The court found that the Coleman Plan does provide for reversion expressly and unambiguously (App. 10). Therefore, this case does not truly raise the "Question Presented" that Petitioners propose — even if this Court were to adopt the standard that Petitioners advocate, the result in this case would not be changed.

II. The Court Below Correctly Construed the Coleman Plan as Providing for Reversion of the Surplus Funds at Issue

As discussed above, the Second Circuit's ruling turned not on any novel interpretation of ERISA but rather on a careful reading of the Plan itself. The Court of Appeals' construction of the particular language of this Plan will not affect anyone other than the parties themselves, and is entirely correct.[9]

Section 9.2(c) of the Plan specifically provides that, "after satisfaction of all liabilities of the Plan, any funds remaining . . . as a result of overpayment may revert to the Company"(A120). In addition, Section 11.5(d)(2) provides that, upon termination, the Trustee shall dispose of any and all surplus funds "as the Company may direct" (A128). For a host of reasons, the authors of the Plan could not possibly have intended that broad reversion language to carve out an exception for surplus funds resulting from Company contributions that generated higher than expected investment returns, which is the way the District Court erroneously interpreted the Plan.

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[9] Respondents and the *amici* who supported Respondents' position in the Court of Appeals — the American Academy of Actuaries and American Society of Pension Actuaries — argued below that the *District Court's* opinion, which incorrectly adopted a presumption against reversion, would have had far-reaching negative consequences for the private pension system. But the Court of Appeals' decision, which avoids such a departure from existing case law, has no such effects.

As the Second Circuit correctly ruled, construing the Plan to bar such a reversion would make no sense in the context of a defined benefit plan. In such a plan, excess funds generated by successful plan investments *are* "funds remaining . . . as a result of overpayment," and the normal expectation is that such funds will revert to the employer upon termination. A defined benefit plan specifies the benefit to be paid, not the amount of the employer's contribution. *See Hughes Aircraft Co.* v. *Jacobson*, 119 S. Ct. 755, 761-62 (1999). Contributions to a defined benefit plan are calculated annually by an actuary, who tries to predict what amount will suffice to provide future promised benefits, based on estimates and projections about future developments. *See Brillinger* v. *General Electric Co.*, 130 F.3d 61, 62 (2d Cir. 1997), *cert. denied*, 119 S. Ct. 1025 (1999); *Wachtell, Lipton, Rosen & Katz* v. *C.I.R.*, 26 F.3d 291, 293-94 (2d Cir. 1994); *Denton* v. *First Nat'l Bank of Waco, Texas*, 765 F.2d 1295, 1298 n.5 (5th Cir. 1985).

One of the important factors the actuary must estimate is future return — that is, what the fund will earn by investing the company's contributions. If the actuary underestimates investment return, then the employer's payments will ultimately prove to have been higher than was necessary to fund the benefits — they will thus turn out at termination to have been *overpayments*, resulting in a plan that is overfunded. In other words, in a defined benefit plan, overfunding as a result of successful investments and surplus funds "remaining as a result of overpayment" are the same thing. Whether there has been an "overpayment" can be determined only in the light of hindsight — the very reason why Section 9.2(c) provides for that determination to be made at the time of Plan termination. Calculation of funds "remaining" because of "overpayments" at termination can refer *only* to that amount left over after obligations to pay benefits are discharged, as the Second Circuit correctly ruled.

The Plan language confirms this interpretation. Section 9.2(b)(2) states that "[t]he Company expects to make sufficient contributions to provide the benefits specified in the Plan" (A120). That sets the standard for what "overpayment" means in

Section 9.2(c): contributions that later prove to have been in excess of what is "sufficient . . . to provide the benefits specified in the Plan." If it is ultimately determined on termination that the Company contributed more than necessary to fund Plan benefits, there are surplus funds "remaining as a result of overpayment." Section 9.2(c) provides that, after the liabilities to Plan participants are satisfied, these remaining funds may revert to the Company (A120). Similarly, Section 11.5(d)(2) specifically provides that all surplus funds are to be disposed of pursuant to the Company's direction, without any exception for funds resulting from successful Plan investments. Indeed, as the District Court itself recognized, reading Section 9.2(c) to bar reversion of the funds at issue here creates a conflict — a completely unnecessary conflict — with Section 11.5(d)(2). When one harmonizes these provisions, as the Court of Appeals ruling does, it becomes plain that they both contemplate reversion of all surplus funds. Tellingly, Petitioners have been unable to offer any plausible explanation of what funds the "as a result of overpayment" phrase was intended to cover if it was not intended to apply to the funds at issue here.

In accord with the Second Circuit's ruling, cases and agency rulings routinely refer to the type of surplus funds at issue here as funds resulting from "overpayment." *See, e.g., Wilson* v. *Bluefield Supply Co.*, 650 F. Supp. 578, 582 (S.D. W. Va. 1986), *aff'd*, 819 F.2d 457 (4th Cir. 1987); *Delgrosso* v. *Spang and Co.*, 769 F.2d 928, 935 (3d Cir. 1985); *Unitis* v. *JFC Acquisition Co.*, 643 F. Supp. 454, 458 (N.D. Ill. 1986); I.R.S. Priv. Ltr. Rul. 8951066, 1989 WL 597342, at 3 (issued Dec. 22, 1989) (A1490); I.R.S. Gen. Couns. Mem. 39806, 1990 WL 698043, at 6 (published Jan. 16, 1990) (A1499).

The 1984 version of the Plan also included the new Change in Control provisions, designed to keep the pension surplus out of the hands of a hostile acquiror of Coleman. As the Second Circuit correctly noted, no such precautions would have been necessary if the Plan already provided that Plan participants, rather than the Company, were entitled to the existing surplus. The Plan should not be interpreted to make these provisions meaningless. Even

more, the 1984 Plan contained new provisions specifying precisely how any surplus delivered to Plan participants would be allocated among them — but those provisions are expressly *limited* to the Change in Control situation. There is no provision for allocating surplus funds among participants if no Change in Control occurs — because, absent a Change in Control, the Plan required that all surplus funds revert to the Company.

In sum, the record overwhelmingly demonstrates that the Court of Appeals correctly interpreted the Plan as providing for reversion of the surplus funds at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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